



Year 2020 Volume 2

In This Issue

Article: Preference of Mediation, Conciliation & Arbitration over Adjudication under Sharia Law

Pages 1-3

LAW IN FOCUS

Rahman's Chambers

© All Rights Reserved



HEADQUARTERS

Suite 5B, 4th Floor, Ataturk Tower
22, Kemal Ataturk Avenue
Banani C/A, Dhaka-1213

DHAKA: HEADQUARTERS | KAKRAIL | SCBA

DINAJPUR | CHATTOGRAM

Contact Us:

TEL: (+8809)678662666

Email: info@rahmansc.com

Web: www.rahmansc.com

This document is for general information only
and is not legal advice for any purpose

ARTICLE:

PREFERENCE OF MEDIATION, CONCILIATION & ARBITRATION OVER ADJUDICATION UNDER SHARIA LAW**

Mohammed Forrukh Rahman*

The obligation to resolve disputes within parameters of the Sharia law comes from the Quran: "We have revealed unto you the Book with the Truth, confirming whatever Scripture was before it. . . so, judge between them by what God had revealed, do not follow their desires away from the Truth."ⁱ Due to word limitation, only procedural aspects of Sharia law is covered in this article.

Islamic jurists introduced three classifications of dispute resolution process under Sharia law, such as, *sulh*, an informal compromise between the parties, usually with the help of an intermediary; *tahkim*, arbitration by a third party knowledgeable in Islamic law; and *qada*, adjudication by qadi based on sharia.ⁱⁱ Unlike *sulh*, an arbitrator and a qadi have the power to impose their decision upon the disputants. On the other hand, *sulh* can be incorporated within the framework of adjudication.

In comparison with common law system, Islamic adjudication procedural law is least formalized in approach, and more flexible.ⁱⁱⁱ This lack of formal procedures comes from the role of the qadi [A qadi is a judge under the *qada* adjudication system], formal involvement of the parties, and the entire court proceedings. The primary goal of the qadi is to enable the aggrieved parties to negotiate their own arrangements. The qadi allows the individuals to express their grievance and expectation from the process. The law forms an organizing framework, not a governing force, and harmony lies in allowing such lines of individual-centered affiliation to work themselves out by the free arrangement of units according to local circumstance.^{iv}

A qadi is a guide in the parties' efforts in finding common ground.^v According to the Islamic faith, formal adjudication may "breed hatred between parties while reconciliation brings them together."^{vi} The main emphasis is placed on oral evidence.^{vii} [although other forms of evidence can be produced] Face-to-face interaction between the qadi and the parties is the substratum of Islamic dispute resolution.

(+8809)678662666
(+8802) 222262821

www.rahmansc.com



Common law finds regularity and consistency with application of law, the mode of analysis etc. by applying the doctrine of precedent. The mode of analysis refers in this context to certain procedures deployed during a trial, such as reliance on trustworthy witnesses as well as moral and communal interest.^{viii} Careful yet flexible stepwise progression shows the trial constitutes, according to Islamic law, the only way to ensure just rulings. As a result, two qadis may reach different conclusions in similar cases because they may be dealing with quite different disputants.^{ix}

While a common law court is bound by the confines of procedural law, mediation, and conciliation and to a large extent arbitration is quite flexible in terms of procedural laws. Particularly, in mediation and conciliation, a workable and equitable solution is sought.^x Mediation and conciliation rests on the assumption that each case is unique and may require different terms of resolution a premises of Qadi justice.^{xi} On the other hand, the doctrine of precedent is not applicable for arbitral tribunals.

As per the holy Quran "There is no blame on them if they arrange an amicable settlement between themselves, such settlement is best"^{xii} Sulh was the Prophet Muhammad's (PBUH) favored method of dispute resolution.

As in Bangladesh, in several Muslim majority countries, mediation between disputants is encouraged officially by the courts or constitutes a prerequisite for judicial proceedings.^{xiii} Similarly, at international law level, where the disputants are states, mediation, conciliation and often arbitration matches with the Islamic norms of dispute resolution. The resemblance manifests itself in logic, procedure, and goals of settlement. In a fundamental way, mediation and conciliation entail ongoing dialogue between the disputants and the intermediary.

The parties themselves have a substantial freedom of action within the general framework of these mechanisms. The settlement proposal offered by a mediator or a conciliator does not take the disputants by surprise, since it flows naturally from the entire resolution process.^{xiv} On the contrary, an international court is bound by the confines of law.

In practice, few states influenced by Sharia law use the international non-binding third-party methods quite often. Mediation and conciliation frequently seem to be the forums of choice not only in the context of disputes within the Islamic states, but also with other countries^{xv}.

Arbitral tribunals, depending on the applicable institutional or ad-hoc rules, may have the flexibilities, compared to court, to accommodate an inclusive process. Nothing prohibits parties to appoint an arbitrator, mediator, who has the expertise in Sharia law and who will apply the principles of Islamic law and procedure in settlement of disputes if the rule provides such flexibilities. Islam uses a different metric to determine who is an appropriate intermediary and what kind of process is considered legitimate. The legitimacy of conflict resolution processes and third-party intervention stems from a mediator's religious, social, and cultural rank. Background and personal credibility are often more important than legal training or other formal education credentials."^{xvi} With time however this has evolved to become more official.

Similarly, in the countries where the courts are bound by the common law doctrine of precedent and judicial process puts less emphasis on the voices of the disputants, mediation, conciliation, and arbitration would be the better choice, to remain compliant with Sharia procedural laws. Most institutional rules and applicable ad-hoc rules are flexible enough to accommodate the requirements of Sharia law.



Harvard Law Professor Noah Feldman wrote in a *New York Times Magazine* article “for most of its history, Islamic law offered the most liberal and humane legal principles available anywhere in the world”. As in the case of Islamic finance, Sharia dispute resolution process, offers a unique & parallel method with immense potential.

- ⁱ Quran, Sura 5, verse 48
- ⁱⁱ Othman 2007, 68
- ⁱⁱⁱ Mitchell and Powell 2011; Glenn 2014
- ^{iv} Rosen 2000, 33
- ^v Hallaq 2005, 59
- ^{vi} Iqbal 2001, 1040
- ^{vii} Othman (2007)
- ^{viii} Rosen 2000, 36
- ^{ix} Emilia Justyna Powell “Islamic Law and International Law,” 141
- ^x Emilia Justyna Powell “Islamic Law and International Law,” 149
- ^{xi} Emilia Justyna Powell “Islamic Law and International Law,” 149
- ^{xii} Quran, Sura 42, verse 40
- ^{xiii} Emilia Justyna Powell “Islamic Law and International Law”
- ^{xiv} Merrills 2017, 86
- ^{xv} Emilia Justyna Powell “Islamic Law and International Law”
- ^{xvi} Abu-Nimer 2010, 74-75

*By **Mohammed Forrukh Rahman** is an Advocate of the Supreme Court of Bangladesh.

** The article was published in the 10th Anniversary special publication of **BIAC**.

